12-5-2008

Houston v. Whittier Respondent's Brief Dckt. 35287

IN THE SUPREME COURT OF THE STATE OF IDAHO

HOWARD HOUSTON,

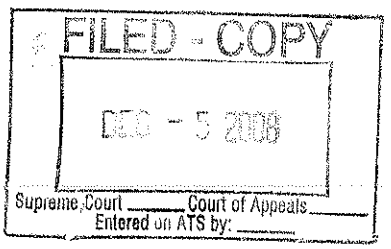
Respondent,

v.

JOHN HUNTING WHITTIER,

Appellant.

Docket No. 35287



RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF BLAINE
(Honorable Robert J. Elgee, Presiding District Judge)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Idaho

COURT RULES

REGULATIONS

OTHER AUTHORITY

STATEMENT OF THE CASE

A. Nature of the Case. Between February and September, 2005, Respondent Howard Houston was lured into making eight separate investments in Wood River Partners, L.P ("Wood River"), totaling $2.75 million. Whittier was the general partner and manager of Wood River, a national investment which he based in Blaine County. Whittier misled investors and committed securities fraud in operating Wood River. Whittier and Wood River were sued by the Securities and Exchange Commission in New York, which filed its action to remove control of Wood River from Whittier and place it into receivership. Whittier was also indicted by a federal grand jury in New York and prosecuted by the United States for criminal securities fraud for his Wood River activities. Whittier pled guilty to three felony counts in the U.S. District Court for the Southern District of New York in February, 2007, and is currently serving a federal prison sentence for his crimes. Houston sued Whittier in Blaine County, alleging Whittier's violation of the Oregon Securities Laws, which prohibit the offering and sale of securities in Oregon by means of misrepresentations and omissions. In October, 2007, Houston moved for summary judgment on two of his six claims for relief. The motion was granted and final judgment was entered in favor of Houston in March, 2008. This appeal followed.

B. Course of the Proceedings. Houston filed his complaint on August 30, 2006. R. p 5. Whittier initially answered, challenging personal jurisdiction over him in Idaho, even though he was a resident of and served with the complaint in Blaine County. Whittier then filed an Answer to the Complaint on December 7, 2006. R. p. 37 - 62. In the Answer, Whittier did not admit or

deny any allegation in the complaint other than to admit that Wood River had been placed into receivership by a federal district court in New York. *Id.* As to all other allegations, Whittier asserted a Fifth Amendment privilege against self-incrimination, which he claimed arose out of the *civil* action that was filed against him by the Securities and Exchange Commission (separate from the criminal indictment filed against him by the United States). R. pp. 38 - 61.

In February, 2007, Whittier pled guilty to three of the four felony charges against him in the New York felony indictment. R., Clerk's Exhibit 1 (Banks Declaration, Exhibit C, p. 17) . Ten months after the guilty plea, on October 30, 2007, Houston filed a Motion for Partial Summary Judgment. R. p. 85-86. Houston argued during the summary judgment proceedings that he was entitled to partial summary judgment on the first and second claims for relief for two reasons: (1) Whittier's guilty plea prevented Whittier from denying that he had made certain misrepresentations about Wood River; and (2) Whittier had never denied the factual allegations in this case, and did not present any evidence controverting Houston's submissions. R. p. 89, Motion for Partial Summary Judgment; Plaintiff's Reply Memorandum In Support of Motion For Partial Summary Judgment, pp. 2-3 (included as Exhibit 3 to Appellant's Motion to Augment Record). Houston's motion was supported by an Affidavit of Howard Houston, and Declaration of Robert S. Banks, Jr., and exhibits, which were filed and received without objection. Clerk's Exhibits 1, 2 (identified at R. 177).

On January 14, 2008, nearly three months after Houston filed his motion for partial summary judgment, Whittier filed a memorandum in opposition to the summary judgment

together with the Affidavit of John Whittier. Supreme Court Order Granting Motion to Augment Record, Exhibits 1, 2. Whittier's Affidavit in opposition to summary judgment was only six paragraphs, and did not contravene any of the facts offered in support of Houston's Motion for Partial Summary Judgment. Whittier's memorandum in opposition to the summary judgment raised for the first time his argument that the Oregon law did not apply to this case.

Houston filed a Reply Memorandum on January 22, 2008, together with a Declaration of Peter Shames. Supreme Court Order Granting Motion to Augment Record, Exhibit 2; R. p. 102-104. Those documents were filed and served on Whittier's counsel on January 22, 2008. The Shames Declaration was filed to address Whittier's new contention that the Oregon law was inapplicable.

On January 24, 2008, Whittier filed a motion to strike the Shames declaration and the reply brief. Supreme Court Order Granting Motion, Exhibit 4. Whittier contended that the reply brief and Shames Declaration had been filed and served one day late. He further contended that the Shames Declaration was not an affidavit, and included inadmissible hearsay statements.

On January 28, 2008, the district court held a hearing on (1) Houston's Motion for Partial Summary Judgment; (2) Defendant's Motion for Leave to File an Amended Complaint; and (3) Whittier's Motion to Strike Houston's Reply Memorandum and the Shames Declaration. At that hearing, Houston moved the court to replace the Shames Declaration with the Affidavit of Peter Shames, which contained the identical sworn declaration statement of Mr. Shames, but was in affidavit format.

On February 1, 2008, the district court signed an interim Order which (1) denied Whittier's motion to file an amended answer; (2) granted Whittier's motions to strike the declarations of Shames and Banks, but granted Houston's motions to substitute affidavits for the declarations; (3) granted Whittier until February 14, 2008, to file any response to the Shames Affidavit; and (4) denied Whittier's motion to strike the reply brief. R. 110-113.

The February 1, 2008 Order also made the following findings of fact and based upon uncontradicted facts submitted by Houston:

a. that Houston made eight investments in Wood River from February, 2005 through September, 2005, totaling $2,750,000;

b. that the sale of the Wood River securities to Houston was made by untrue statements of material fact and omissions to state material facts, and that Houston was unaware of those untrue statements and omissions;

c. that during the times that Houston made his purchases, Whittier was a managing partner, officer and/or director of Wood River. R. 110-113.

The February 1, 2008 Order reserved for further proceedings the question of whether Oregon or Idaho law applied to the sales of Wood River to Houston, and invited further briefing on that issue. *Id.*

The parties filed further briefs on whether the Oregon law applied on February 21 and February 26, 2008. Whittier filed a Memorandum in Support of the Application of the Idaho Uniform Securities Act. R. p. 114 - 123. Houston filed Plaintiff's Memorandum Regarding

Application of Oregon Law, R. p. 130 -138, and Affidavit of Robert S. Banks, Jr. in Support of Entry of Final Judgment, R. p. 139-143.

Whittier also filed objections to the form of the judgment that Houston had proposed. R. 144-153. In his objections, Whittier contended that the "tender requirement" of the securities laws requires delivery of the securities to the defendant, with no obligations of the defendant to pay for the securities. Whittier also contended in that motion that plaintiff only sought summary judgment on the issue of liability, not damages. *Id.* Houston filed a Reply Memorandum to Whittier's objections. R. p. 154-160.

The district court held the hearing by telephone on February 27, 2008. After hearing argument from the parties and considering the briefs, the district court issued an Order on Entry of Judgment on March 19, 2008. In that Order, the district court made specific findings, and concluded that the Oregon securities law applied to Houston's claims, and that Houston had satisfied the tender requirement of the securities laws by sending a letter in which Houston tendered the securities upon payment of the amount of the judgment. R. p. 161-165. The Order determined that the entry of summary judgment in favor of Houston was appropriate. R. p. 163.

The district court also made the following specific findings:

a. The Affidavit of Howard Houston filed on October 30, 2007 clearly set forth the amount of Houston's investments, and that the amounts and dates were never controverted by Whittier. R. p. 161.

b. Houston moved for summary judgment on the first and second claims for relief, and

never limited his motion for partial summary judgment to liability issues. R. p. 162.

c. Houston had satisfied his obligations to tender the securities back to Whittier by doing so conditional upon payment. The district court rejected Whittier's argument that Houston must actually send his rights and title in Wood River to Whittier in federal prison without any obligation on Whittier's part to pay for it. The court also noted that there was no evidence that Whittier paid for or even offered to pay for Houston's Wood River interest (and in fact Whittier has not satisfied any of the judgment as of this writing). R. p. 163.

The district court then entered a Final Judgment in favor of Houston for $3,234,881 on March 19, 2008. R. p. 166-67.

Houston filed an unopposed motion for dismissal of the third, fourth, fifth and sixth claims for relief, which were not subject to the partial summary judgment motion, which was granted on March 25, 2008. R. p. 169-70.

Whittier then timely filed this appeal.

C. <u>Concise Statement of the Facts</u>.

1. Whittier was the general partner of Wood River from February, 2003 through the Fall of 2005. R., Clerk's Exhibit 1 (Banks Declaration, Exhibit C, lines 20-21). In addition, Whittier was the principal and managing member of the general partner for Wood River, Wood River Associates, LLC. Whittier was also the managing member of Wood River Capital Management, LLC, which was responsible for administrative matters for Wood River. R., Clerk's Exhibit 2 (Affidavit of Howard Houston, Exhibit B, p. 3).

2. On or about June 2004, Whittier and Wood River issued a Confidential Private Offering Memorandum ("Offering Memorandum"), which set forth the terms of Wood River and its investment program. Plaintiff Howard Houston was sent a copy of that Offering Memorandum. R., Clerk's Exhibit 2 (Affidavit of Howard Houston, ¶ 3, Exhibit B).

3. In addition, Whittier and Wood River prepared a Confidential Summary of the Wood River investment. Plaintiff Howard Houston was sent a copy of that document as well. *Id.*, ¶ 2, Exhibit A.

4. The Confidential Summary stated that Wood River would:

A. Be a diversified investment that would be "Flexible and Nimble" and would use "Bottom Up Fundamental Research , Sector Selection and Technical Analysis." *Id.*, Exhibit A, p. 2.

B. Be diversified with a focus on the media, communications, health care, biotechnology, financial services, technology and internet, telecommunications, consumer staples, and consumer cyclicals sectors. *Id.*

5. Likewise, the Offering Memorandum represented that the Wood River investment would be a balanced and diversified investment designed to limit losses. R., Clerk's Exhibit 2 (Affidavit of Howard Houston, Exhibit B,) The Offering Memorandum specifically represented that Wood River would:

A. Achieve capital appreciation through the combination of long and short equity investments in a diversified number of industries. Affidavit of Howard Houston, Exhibit B, pp.

10-11.

B. Make "broad based" investments. *Id.*.

C. "[T]ypically hold 30-40 long positions." *Id.*

D. Cap all long positions at "10% of the original cost" and cap all short positions at "5% of the original cost." *Id.* at p. 11.

E. Deliver "consistent absolute returns for its limited partners." *Id.*

F. Base its investment strategy on fundamental research, as well as both qualitative and quantitative analysis." *Id.*

6. In late 2004, Houston was solicited to make an investment in Wood River. R. Clerk's Exhibit 2, Affidavit of Howard Houston, ¶ ¶ 2, 3. Houston received a copy of the Offering Memorandum and the Confidential Summary. *Id.*

7. Houston reviewed the Wood River materials he received with his assistant, Peter Shames. Based on representations made in the Offering Memorandum and Confidential Summary, Mr. Houston agreed to invest in Wood River. Affidavit of Howard Houston ¶ 4.

8. Although the Offering Memorandum stated that the minimum investment was $1,000,000, Mr. Whittier allowed Mr. Houston to make an initial contribution of $250,000, with the understanding that he would make additional contributions if Houston was satisfied with Wood River's performance. Affidavit of Howard Houston ¶ 5.

9. Mr. Houston invested in Wood River in the following amounts by delivering funds to Wood River's bank account at the First Bank of Idaho in Ketchum, Idaho:

February 2005	$250,000
March 2005	$250,000
April 2005	$500,000
May 2005	$250,000
June 2005	$250,000
July 2005	$500,000
August 2005	$250,000
September 2005	$500,000

Mr. Houston's total cash investment in Wood River was $2,750,000. Affidavit of Howard Houston ¶ 6.

10. Houston agreed to make his contributions after February, 2005 based upon his understanding that the investment parameters for Wood River as described to him had not changed, and upon his understanding that the fund was performing well. Affidavit of Howard Houston ¶ ¶ 6, 7, 9, 10.

11. Houston received periodic performance reports from Whittier and Wood River. Each of the reports he received represented that the fund was making money, and was well diversified. None of the reports ever suggested that the fund was concentrated in any particular security or securities. Affidavit of Howard Houston ¶ 6, 7, 9, 10. For example, Houston's assistant, Peter Shames, received a Wood River report from Whittier dated July 26, 2005 which listed the top five holdings of Wood River, and stated that they represented 4-5% of all of Wood River's Holdings.

They included Microsoft, Sirius Satellite, and E-Bay. That July report also represented that the 6th through 10th biggest holdings represented 3-3.5% of Wood River's holdings. Those stocks included such well known stocks as Yahoo! Endwave was not listed anywhere in the top ten holdings. Affidavit of Howard Houston ¶ 8, Exhibit C. Endwave was only listed in the Top 10 small cap/distressed holdings, which were identified as "weighted 2-2.5%" of the total Wood River portfolio. *Id.*

12. Whittier's representations about Wood River's holdings and performance were false. Wood River's July, 2005 brokerage statements that the Securities and Exchange Commission obtained indicate that, at the end of July, 2005, the Endwave position at Wood River was 5,150,523 shares. The Endwave shares were worth approximately $180 million, and comprised 65% of Wood River's assets under management. At that time, which was the date Whittier sent the report to Houston described in the previous paragraph, Wood River owned more than 45% of all outstanding shares of Endwave. R., Clerk's Exhibit 1(Banks Declaration, Exhibit D. (Declaration of Charles Joshua Felker In Support Of Plaintiff's Application For Entry Of An Order Granting A Preliminary Injunction), ¶ 22.).

13. Endwave was no Microsoft. It was a small cap technology company that admitted in its March, 2005 Form 10K filing that "We have had a history of losses. We had a net loss of $4.4 million in 2004. We also had net losses of $31.0 million and $7.9 million for the years ended December 31, 2002 and 2003, respectively." Banks Declaration, Exhibits E, F (2004 10K and 2005 10K SEC filings). In fact, Endwave never had never reported a profitable year. It was also a

small public company. Its March 4, 2004 Form 10K filing reported that it had only 108 employees. *Id.*

14. Endwave was also a volatile stock. It traded in ranges from less than $10 to over $50 per share while Whittier was accumulating it. It was also thinly traded. Except during the times that Whittier was acquiring it, its total daily trading volume of both purchases and sales was less than the 5 million shares that Wood River secretly owned. Banks Declaration, Exhibit G. (Endwave performance and volume chart). In other words, there was no visible market for the Endwave shares if Wood River desired or needed to sell them.

15. Mr. Houston had never heard of Endwave while he was investing $2.75 million in Wood River. Houston was unaware that Wood River was so concentrated in Endwave. Had he known that, he would not have considered an investment into Wood River. Affidavit of Howard Houston ¶ 10.

16. By mid-September, representatives of BNP Paribas (BNP), a large institutional investor in Wood River, had been pressing Wood River Partners and Whittier to redeem a $49 million investment BNP had made on behalf of a customer. BNP had given notice of its redemption on June 29, the redemption amount was determined as of July 29, and the redemption payment had come due at the end of August. Whittier was unable to meet that redemption request. See Banks Declaration, Exhibit D (Declaration of Charles Joshua Felker In Support Of Plaintiff's Application For Entry Of An Order Granting A Preliminary Injunction, ¶ 26-27).

17. Whittier never told Houston that Wood River was unable to meet redemption requests

of its investors. Whittier accepted Houston's $1.25 million contribution to Wood River from July through September, 2005, while Wood River was so insolvent it could not fill the redemption request. Had Houston been told that Wood River was illiquid and concentrated in Endwave stock, he would not have invested $1.25 million in that time period. Affidavit of Howard Houston ¶ ¶ 10, 11.

18. After Whittier was unable to meet redemption requests for BNP and other investors in Wood River, the Securities and Exchange Commission filed a civil lawsuit against Whittier and the Wood River entities for fraud, injunctive relief, and to place Wood River into receivership. A federal court in New York placed Wood River into receivership in November, 2006, and it remained there to the time of the entry of judgment in this case (and is still pending as of this writing). Banks Declaration, Exhibit A. (Order For Injunctive Relief in *Securities and Exchange Commission v. Wood River Capital Management, et al*, No 05 CV 8713 (S.D.N.Y. 2006)).

19. A federal grand jury issued a criminal indictment against Whittier in February, 2007 in *United States of America v. John H. Whittier*, No. 07 Crim. 087 (S.D.N.Y. Feb 1, 2007). Banks Declaration, Exhibit B (Indictment). The indictment charged four counts of securities fraud in connection with the failure to disclose the Media Bay and Endwave positions to investors; and failure to report holdings of Media Bay in excess of 10% of the outstanding stock; and failure to report holdings in excess of 5% and 10% of Media Bay stock, another stock in which Wood River was overconcentrated. *Id.*

20. On May 30, 2007, Whittier pled guilty to three of the four counts in the indictment. He

pled guilty to Counts 1, 2 and 4 of the indictment. Banks Declaration, Exhibit C. (Transcript of Proceedings of May 30, 2007, p. 17).

21. Count 1 of the criminal indictment alleged that Whittier created and implemented a scheme to defraud Wood River investors by: (1) acquiring more than 70% of the stock of Endwave without disclosing that fact to investors; (2) falsely representing to Wood River investors that he would pursue a broad investment strategy in which no one holding would comprise more than 10% of Wood River's assets; and (3) falsely representing to Wood River investors that the fund was being audited by outside investors. Banks Declaration, Exhibit B. (Indictment ¶ 9). Whittier pled guilty to this count. Banks Declaration, Exhibit C. (Transcript of Proceedings of May 30, 2007, p. 17).

22. Count 3 of the criminal indictment alleged that Whittier acquired more than 10% of the outstanding stock of Endwave and failed to disclose that ownership, contrary to SEC rules. Banks Declaration Exhibit B, Indictment at ¶ 51. Whittier pled guilty to this count. Banks Declaration, Exhibit C. (Transcript of Proceedings of May 30, 2007, p. 17).

23. Count 4 of the criminal indictment alleged that Whittier also acquired for Wood River a large position in a company called Media Bay that was more than 20% of all of the outstanding stock of Media Bay. Further, Whittier did not disclose to the investing public or Wood River investors his position in an effort to defraud investors. Banks Declaration Exhibit B, Indictment at ¶¶ 53, 54. Whittier pled guilty to this count. Banks Declaration, Exhibit C. (Transcript of Proceedings of May 30, 2007, p. 17).

24. In entering his plea of guilty to counts 1, 3 and 4 of the indictment against him, Whittier stated under oath in open court that:

> I was general partner of Wood River Partners from 2003 through the fall of 2005 and Wood River Offshore from July of 2005 through the fall of 2005. **In that capacity I engaged in wrongful conduct, including intentionally concealing the size of my beneficial ownership position in a public company called Endwave Corporation. I purchased and sold Endwave stock knowing that the true–the truth regarding my Endwave holdings was material information that was not publicly known**.
>
> **As general partner of both funds, I misled my investors in several ways. For example, I knowingly and intentionally failed to cause the timely filing of forms with the SEC pursuant to Rules 13d-1 and 16a, disclosing that I beneficially owned in excess of 5% and 10%, respectively, of shares of Endwave**.
>
> **Further, the undisclosed concentrated position in the Endwave security far exceeded the maximum cap for a single stock provided for in the funds [sic] stated investment parameters**.
>
> **In addition, in the summer of 2005, I caused a false filing of a schedule 13D-G form, which did not accurately disclosed the complete and beneficial ownership I had of a company called Media Bay. At the time of the filing I knew that this was material information.**
>
> I knew at the time that I was doing wrong. I've embarrassed myself and my family and caused harm to my investors.

Banks Declaration, Exhibit C, (Transcript of proceedings at 14-15).

25. On December 7, 2006, Whittier filed an Answer and Demand for Jury Trial, in which he refused to answer any of the allegations in the Complaint. R. p. 37-63. Whittier based his refusal to answer and his invocation of the Fifth Amendment on the basis that there was a federal *civil* lawsuit filed against Whittier by the Securities and Exchange Commission. Whittier did not

mention the criminal indictment filed against him by the United States in seeking to invoke his Fifth Amendment Privilege.

26. Whittier did not offer any evidence to refute any of the following facts in Plaintiff's Complaint:

A. Whittier controlled the Wood River investment. R. 7, ¶ 6;

B. Houston received written information about Wood River which made certain representations. R. 9-11, ¶ 12 - 16.

C. Houston invested $2.75 million in Wood River based upon those representations. R. 11-12, ¶ 18; and

D. The documents Houston received about Wood River included material misrepresentations and omitted to state material facts. R. 12-16, ¶¶ 19-21.

27. Whittier did not offer any evidence to refute Houston's sworn statement in his affidavit that he was unaware of the multiple misrepresentations and omissions Whittier had made to induce him to invest in Wood River. ¶¶ 4, 7-12.

ISSUES ON APPEAL

The issues on appeal are set forth in the Appellant's Brief at pages 6 -7.

ATTORNEY FEES ON APPEAL

Houston requests attorney fees on this appeal pursuant to ORS 59.115(10), which provides that "the court may award reasonable attorney fees to the prevailing party in an action under" ORS 59.115, the statute under which the district court granted summary judgment. Houston did not

move the court for attorney fees in the district court in order to save time and expense. Now that Whittier has forced him into another court proceeding, he requests his reasonable attorney fees incurred on this appeal. In deciding the attorney fee issue on appeal, Houston respectfully requests that this Court take into consideration Whittier's conduct in the district court in addition to the filing of this appeal. In addition, Houston requests attorney fees pursuant to I.C. § 12-120, relating to commercial transactions, and § 12-121, on grounds that the appeal is frivolous.

STANDARD OF REVIEW

Houston agrees with the general standards of review described in Appellant's Brief at 9. However, as to the issue of whether the district court erred in permitting the filing of the Reply Memorandum and the Shames Affidavit, the correct standard of review is abuse of discretion. I.R.C.P. 56(c)("court may alter or shorten the time periods and requirements of this rule for good cause shown"); *Bennett v. Bliss*, 103 Idaho 358, 360, 647 P.2d 814 (Ct. App. 1982).

ARGUMENT

I. THE COURT PROPERLY GRANTED HOUSTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE WHITTIER OFFERED NO FACTS TO CONTRAVENE THE ALLEGATIONS AND EVIDENCE OFFERED BY HOUSTON. THERE WERE NO MATERIAL FACTS IN DISPUTE

This appeal can largely be decided by applying the facts described above to the familiar standards in Idaho Rules of Civil Procedure 56(c) and (e). Rule 56(c) provides that summary

judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

See also: *State ex rel. Department of Labor & Indus. Services. v. Hill*, 118 Idaho 278, 284 (Idaho Ct. App. 1990)(applying Rule 56(e)).

Here, Houston set forth a detailed statement of facts in his Complaint. R. pp. 6-16. In moving for summary judgment, he filed contemporaneous sworn statements of Howard Houston and Robert S. Banks Jr. Clerk's Exhibits 1, 2. Houston's affidavit in particular describes the representations that Whittier and the offering materials made, which convinced him to invest $2.75 million over eight months. Houston's statement further describes how Whittier sent out supposed progress reports showing a positive performance of Wood River that contained outright lies. The attachments to the Banks Declaration, particularly Exhibits A and D, detail what was actually occurring at Wood River. Clerk's Exhibit 1.

Whittier neither objected to nor offered evidence in any form to contravene the record filed by Houston. Whittier had ample opportunities to do so. He was served with Houston's summary judgment motion on October 31, 2007. When Whittier responded on January 14, 2008, he filed an

affidavit in response to Houston's summary judgment motion. However, it was only six paragraphs long, and did not dispute *any* of the facts that Houston had offered in support of his motion. Supreme Court Order Granting Motion, Exhibit 2. After the summary judgment hearing on January 31, The district court's interim Order granted Whittier an additional two weeks to file any affidavits in opposition to the Shames Affidavit. R. p. 110-113. Whittier again failed to offer any facts to create a genuine issue of any material fact upon which the summary judgment motion was based.

As Houston pointed out in the district court:

> *Therefore, regardless of any issues relating to presumptions and the Fifth Amendment,regardless of the doctrines of issue preclusion and claim preclusion, and regardless of whetherWhittier is permitted to file an amended answer, there are simply no facts in dispute.* Wood River was sold by means of statements made in an offering circular. Those statements, Whittier has admitted, were untrue. The sale of a security by means of untrue statements is a violation of ORS 59.115 and ORS 59.135. Whittier is a person liable for the sale as a seller, and/or as a "partner, limited liability company manager, including a member who is a manager, officer or director of such seller" pursuant to ORS 59.115(3). Whittier admits to being a partner and the manager of Wood River Partners, and of controlling its trading operations. All liability factors have been established. There are no issues left to try on the First or Second Claims For Relief.

Supreme Court Order Granting Motion, Exhibit 3 (Reply Memorandum at 3).

Based upon the undisputed record, The district court properly granted Houston's motion for partial summary judgment. R 161-165.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE FILING OF THE REPLY MEMORANDUM AND SHAMES AFFIDAVIT

BECAUSE THERE WAS NO PREJUDICE TO WHITTIER AND WHITTIER WAS GIVEN AN OPPORTUNITY TO FILE ANY RESPONSIVE AFFIDAVITS, BUT DID NOT DO SO.

Whittier assigns as error the district court's decision to deny Whittier's Motion to Strike Houston's Reply Memorandum and the Declaration of Peter Shames. Whittier relies upon Rule 56(c) of the Idaho Rules of Civil Procedure, which provides "[t]he moving party may thereafter serve a reply brief not less than 7 days before the date of the hearing." Rule 56 does not address when service is complete, because that is addressed in Idaho Rule of Civil Procedure 5(b), which provides that "[s]ervice by mail is complete upon mailing." The parties agree that "[b]oth the Shames Declaration and the Reply Memorandum were served on Whittier by Federal Express overnight mail on January 22, 2008." Appellant's Brief at 10. The hearing was held on the afternoon of January 28, 2008, so the brief was served six days before the hearing instead of the seven provided for in the rule.

Rule 56(c) grants district courts discretion to shorten the time periods. It states that "[t]he court may alter or shorten the time periods and requirements of this rule for good cause shown, may continue the hearing." *See also*: *Bennett v. Bliss*, 103 Idaho 358, 360, 647 P.2d 814 (Ct. App. 1982) (motion for an extension of time to file additional affidavits, depositions, and interrogatories in opposition to a motion for summary judgment lies within the discretion of the district court).

The district court was acting within the express discretion granted by Rule 56(c) in allowing the reply brief and declaration to be filed. In fairness, Houston had served Whittier with the Motion for Partial Summary Judgment on October 30, 2007. R pp. 85-87. Whittier served a

response two and a half months later, on Friday, January 11, 2008, and it was received on Monday, January 14. Houston took eight days to file his response, and had to address defenses relating to the application of Oregon law that Whittier had not previously raised. Moreover, Houston's Reply Memorandum was limited to ten pages. And, since Houston extended the courtesy of serving the Reply Memorandum and supporting papers by Federal Express overnight delivery, Whittier's actual receipt of the papers was sooner than it would have been had Houston timely served them by First Class Mail on January 21. Finally, with respect to the arguments in the Reply Memorandum, Houston's could have simply made an oral presentation at the hearing raising all of the arguments and authorities made in the Reply Memorandum. It was more helpful to the district court and counsel to be able to also consider the arguments in written form. Houston acknowledges that he should have filed his reply a day sooner, but there was no prejudice to Whittier and the court acted within its discretion in allowing the filing.

Whittier complains that the Shames Declaration "presented new and different factual information." Appellant's Brief at 12. The only purpose of Mr. Shames's statement was to address the issue of the application of the Oregon Securities Laws to the sale of Wood River to Houston, an Oregon resident. Whittier had never raised that issue in his stated affirmative defenses, R. 59-61, or anywhere else in his Answer. Whittier was required to do so under Rule 12(b) of the Idaho Rules, which provides that "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required."

Whittier was at no disadvantage as a result of the filing of the Shames's Affidavit. The district court gave Whittier until February 14, 2008, to file any response to the Shames Affidavit and the Oregon law argument. Record p. 112, ¶ 7. Under Rule 43(e), The district court could have heard evidence supporting motions by oral testimony at the hearing. Furthermore, The district court scheduled another hearing to allow the parties to further argue the issues that the Shames Affidavit addressed on February 27, 2008. Record p. 112, ¶ 7.

The district court exercised precisely the type of discretion that Rule 56(c) contemplates. It considered the circumstances and realities of the case. It made sure that there was no prejudice, and it provided both sides with ample opportunities to submit any evidence and arguments that they wanted him to consider. If the district court abused its discretion here by allowing the service of the brief one day late under the circumstances of this case, then the mandate of Rule 56(c) allowing district courts to "alter or shorten the time periods and requirements of this rule for good cause shown" becomes meaningless.

III. THE DISTRICT COURT PROPERLY DETERMINED THAT THE OREGON SECURITIES LAWS APPLY TO THE SALE OF WOOD RIVER TO HOUSTON BECAUSE THE UNCONTROVERTED EVIDENCE WAS THAT ALL SOLICITATIONS WERE DIRECTED TO HOUSTON IN OREGON.

A. The Oregon Law Specifically Provides That It Governs Securities Transactions In Which Offers To Purchase Are Directed To Oregon.

The Oregon statutes define when Oregon law applies to a securities transaction with a nexus to Oregon, and the statutory language makes clear that the Oregon securities laws apply to Mr. Houston's $2.75 million purchase of Wood River. ORS 59.335 provides:

> (1) ORS 59.055, 59.115 to 59.125, 59.135 and 59.145 and subsection (1) of ORS 59.165 apply to persons who sell or offer to sell when:
>
> (a) An offer to sell is made in this state

ORS 59.345, in turn, provides:

> (1) For the purpose of ORS 59.335, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer:
>
> (a) Originates from this state; or
>
> (b) Is directed by the offeror to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed offer). (emphasis added)

In *Stimmel v. Shearson, Hammill & Co.*, 411 F. Supp. 345 (D. Or. 1976), the court was faced with the issue of whether the Oregon securities laws applied to transactions in which the defendants were in California. There, the plaintiffs actually initiated contact with the defendants by visiting them in defendants' offices in California. Plaintiffs subsequently bought and sold securities through defendants, by telephone calls which were initiated sometimes by defendants from California, and sometimes by plaintiffs from Oregon. There was no claim of fraud in that case – the defendants merely had not registered to sell securities in Oregon, believing that the plaintiffs were California residents. Still, the *Stimmel* court was compelled to find that the Oregon securities laws governed the transaction because the solicitations were directed to Oregon.

It is well recognized in securities law jurisprudence that states may enact and enforce securities laws for transactions that are directed to occur within their borders. Cases are

routinely brought by states and private litigants for violation of state securities laws by persons who are not found in the state. If it were otherwise, states would be powerless to regulate transactions directed to their citizens by non-residents. Given the interstate nature of the vast majority of securities transactions, that would mean that state securities laws would be virtually unenforceable. Thus, in Oregon, for example, the Oregon Supreme Court held that an Idaho lawyer could be liable under Oregon securities statutes for preparing offering documents in Idaho for an investment sold in Oregon. *Prince v. Brydon*, 307 Ore. 146, 150, 764 P.2d 1370 (1988).

Idaho courts are no different. The Idaho Court of Appeals in *State of Idaho v. Tenney*, 124 Idaho 243, 858 P.2d 782 (1993), affirmed a trial court's finding that a non-resident was liable for violations of the Idaho Securities Act. The court found, in a personal jurisdiction context, that an individual who prepared offering materials outside Idaho to be used in Idaho to solicit investors was subject to Idaho jurisdiction in a claim brought by the state for violations of the Idaho Securities Act, i.e. § 30-1401,even though he never came to Idaho and had no offices or employees there. *Id.* at 246. The court affirmed findings against him for violations of the Idaho Securities Act.

The Idaho Supreme Court should affirm the application of the Oregon Securities Laws when an offering is directed to an Oregon citizen from Idaho, just as Oregon would certainly enforce Idaho's laws if an Idaho citizen sued a defendant located in Oregon who directed an illegal offering to Idaho. This Court should give full faith and credit to the Oregon statutes as the apply to

Oregon citizens harmed by an individual who decides to operate a fraud out of Blaine County.

B. The District Court Did Not Commit Error In Refusing To Strike The Shames Affidavit Because It Set Forth Admissible, Unrefuted Facts That The Wood River Offer Was Directed to Houston In Oregon.

The uncontroverted evidence from the sworn statements submitted by Mr. Shames and Mr. Houston was that all of the offers sell Wood River to Mr. Houston were directed to him or his assistant Shames in Oregon. Record, pp. 108-109 (Shames Affidavit); Clerk's Exhibit 2, ¶¶ 3, 4 (Houston Affidavit). The Shames Affidavit directly addresses the statutory requirements of ORS 59.345, discussed at page 22, *supra,* which states that a sale occurs in Oregon when the offer is directed to this state and received at the place to which it is directed. The full portion of the Shames Affidavit on that issue is as follows:

> I, PETER SHAMES, after being duly sworn, make the following statement based upon personal knowledge and under the penalties of perjury:
>
> 1. In 2004 and 2005, I was employed by Howard Houston. One of my jobs was to assist him in reviewing and ultimately subscribing for the Wood River Partners investment that this lawsuit is about.
>
> 2. I have reviewed the Affidavit of Howard Houston in Support of Plaintiff's Motion for Partial Summary Judgment, and know the facts stated there regarding his purchase of the Wood River Partners investment to be accurate. I was the one who received the original solicitation of the Wood River investment on Mr. Houston's behalf. The original solicitation for Mr. Houston to invest in Wood River was directed to me in Hood River, Oregon, in November or December, 2004, for forwarding to Mr. Houston. Wood River representatives then sent Mr. Houston additional information about Wood River, and directed those communications to me in Oregon. Mr. Houston was also in Oregon during those times.

R. p. 108.

The Shames Affidavit is admissible evidence on where the offer to purchase the Wood River investment was directed. Indeed, it is the *best* evidence of that fact, since Shames "was the one who received the original solicitation for Mr. Houston to invest in Wood River." Those statements are not inadmissible hearsay. They are made by Mr. Shames, based upon his personal knowledge. The fact that Shames states he reviewed the Houston affidavit and knows the facts stated there regarding the purchase of the Wood River partners to be accurate is also admissible, though not necessary for a determination on the question of where the sale occurred under Oregon law. The Houston Affidavit, which was prepared before Whittier had raised his defense of the inapplicability of Oregon law, established that the Wood River investments materials were sent to him and Shames. Clerk's Exhibit 2 (Houston Affidavit ¶¶ 2, 3), but it did not say *where* the materials were sent to.

Whittier's reference to other paragraphs of the Affidavit are of no consequence. Shames's statement that he reviewed Houston's affidavit is not hearsay. Moreover, it is included as background, and not a material fact for summary judgment purposes.

C. Even If The District Court Had Improperly Applied Oregon Law, Any Error Would Have Been Harmless Because The Liability Provisions Of Idaho's Securities Laws Are Identical And Idaho's Damages Calculations Would Be More Onerous To Whittier.

Oregon and Idaho both have adopted certain provisions of the Uniform Securities Act ("USA"), and for that reason their liability provisions are identical for present purposes. The laws

of each state are reproduced below:

ORS 59.115. Liability in connection with sale or successful solicitation of sale of securities	I.C. § 30-14-509. CIVIL LIABILITY
(1) A person is liable as provided in subsection (2) of this section to a purchaser of a security if the person: * * *	* * *
(b) Sells or successfully solicits the sale of a security in violation of ORS 59.135 (1) or (3) or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.	(b) A person is liable to the purchaser if the person sells a security in violation of section 30-14-301, Idaho Code, or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission.

The damages provisions of the Oregon and Idaho securities acts are similar, but Idaho actually provides *greater* damages to plaintiffs. Both states use the USA's recessionary measure of damages, but Idaho provides for mandatory attorney fees for prevailing plaintiffs, while Oregon leaves the award of attorney fees to the discretion of the trial judge. And, the interest rate required by Idaho law is 10%, while Oregon allows only 9%. *Cf.* ORS 59.115(2) and ORS 82.010 (providing for the rate of interest 9% per annum *with* I.C. § 30-14-509 and I.C. § 28-22-104(2)(providing for interest at the rate set by the Idaho State Treasurer). The base legal rate of interest for July 1, 2007 - June 30, 2008 for purposes of I.C. § 28-22-104(2) as set by the State Treasurer is 10%. *See:* http://sto.idaho.gov/Reports/LegalRateOfInterest.aspx.

It was to Whittier's distinct advantage to proceed under the Oregon rather than the Idaho

statutes. The 1% interest difference between the statutes of Idaho (10%) and Oregon (9%), on an investment of $2.75 million that began more than four years ago, is more than $100,000. The only conceivable advantage to Whittier (who has yet to satisfy any of the judgment) from making this argument is to force Houston to spend more money pursuing his claims. Thus, even if the district court did commit error in applying Oregon law (and it did not), it would have been harmless error because it did not affect Whittier's substantive rights. *Smith v. Mitton*, 140 Idaho 893, 901, 104 P.3d 367, 375 (2004)("an error that does not affect the substantial rights of a party shall be disregarded as harmless error").

IV. WHITTIER'S GUILTY PLEA TO THREE FELONY COUNTS OF SECURITIES FRAUD PRECLUDE HIM FROM DENYING FACTUAL ALLEGATIONS OF MISREPRESENTATION AND OMISSIONS THAT ESTABLISH LIABILITY HERE.

A. This Court Need Not Reach The Issue Preclusion Question To Decide This Case Because Summary Judgment Was Supported By Whittier's Failure To Deny The Controlling Facts In This Record.

As Houston argued below, he was entitled to summary judgment both because there were no material facts in dispute, Supreme Court Order Granting Motion, Exhibit 2 (Reply Memorandum at 3), and because of the principles of issue preclusion resulting from Whittiers' guilty plea. R. p. 100 (Plaintiff's Summary Judgment Memorandum at 13). This Court need not even reach the issue of issue preclusion, because Whittier's failure to offer any evidence to contravene the material facts supporting the summary judgment fully supports The district court's decision. See discussion *supra* at 17 -19.

Whittier's argument is premised entirely upon his contention that the district court granted summary judgment based solely on the Whittier guilty plea. Appellant's Brief at 15, 18. That is incorrect. The interim order of February 1, 2008, granting partial summary judgment made findings of fact from evidence offered by Houston that were entirely independent of Whittier's guilty plea. For example, The district court found that Houston had invested $2.75 million into Wood River. R. p. 111 (Order of February 1, 2008). That finding was necessarily based upon Houston's unopposed statement to that effect in his affidavit. *Id.* at ¶5a.

B. The Proper Test For Applying Issue Preclusion Resulting From A Guilty Plea To A Subsequent Civil Action Is Found In Anderson v. City of Pocatello.

All of the arguments Whittier raises are resolved by the law set forth in *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986). There, this Court considered the specific question of whether a criminal conviction can serve as a collateral estoppel to bar the re-litigation of an issue in a later civil suit involving different statutes than those governing the criminal case. The court stated:

> we are constrained to hold that under the conditions described above, collateral estoppel bars the relitigation of an issue determined in a criminal proceeding in which the party sought to be estopped had a full and fair opportunity to litigate that issue

Id. at 179, 731 P.2d at 174.

Plaintiff there brought a civil rights action, after he was shot by police officers. In connection with the incident, plaintiff had been found guilty of Idaho Code § 18-3304,

Intentionally Aiming a Firearm at Others. The court held that, as a result of the conviction, plaintiff "was estopped from denying that he had pointed his shotgun at someone, at some point in time." *Id.* at 185, 731 P.2d 180. Obviously, the civil rights action was based upon a different statute than the criminal statute to which plaintiff had pled guilty. In that case, there remained the issue of whether the plaintiff was pointing his gun at the officers at the time he was shot, and for that reason, summary judgment was denied to the defendants, but the estoppel ruling, which was one of first impression in Idaho, was clear and stands today.

The *Anderson* court addressed the issue of "mutuality" which has in some circumstances been held to require that the parties in both cases be identical before issue preclusion applies. This Court criticized that requirement in the criminal case context, saying:

> To permit relitigation of an issue that was fully and fairly litigated and lost in a prior action undermines the worthwhile purposes of the collateral estoppel rule without serving any other recognizable good purpose. *This is particularly true when the party sought to be estopped was the defendant in a prior criminal action resulting in conviction, where the safeguards and burden of proof favored the defendant.*

Id. at 183, 731 P.2d at 178. (emphasis added).

The *Anderson* case held that the more appropriate test is (1) whether the criminal defendant had a full and fair opportunity to litigate the issue; (2) are the issues in the two cases identical; and (3) were the issues actually decided. *Id.* Here, all three parts of the test were met.

C. Each of the Three Elements Of The Anderson Test Were Satisfied.

1. Full and fair opportunity to litigate.

Whittier had a full and fair opportunity to litigate the issue of his guilt of securities fraud. Clerk's Exhibit 1 (Declaration of Robert S. Banks, Jr., Exhibit C, pp. 7 - 12 (Whittier's guilty plea in open court, acknowledging his understanding of the proceedings, his rights, and that he could receive up to 235 months in prison)).

2. Identical Issues.

Whittier contends that his guilty plea to securities fraud should not prevent him from litigating the issue here because he pled guilty to federal securities fraud but not Oregon securities fraud. However, the issues and elements of the Oregon and federal laws are identical. Whittier pleaded guilty to Rule 10b-5 of the 1934 Securities Act in connection with Wood River. Supreme Court Order Granting Motion, Exhibit 1(Whittier's Memorandum In Opposition To Plaintiff's Motion For Partial Summary Judgment, at 9). That criminal count is virtually identical to the First Claim For Relief in this case, alleging violations of ORS 59.135. The laws governing the criminal count to which Whittier pleaded guilty, and the second claim for relief here, are as follows:

Criminal Indictment Count 1 17 CFR § 240.10b-5 It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commere, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme or artifice to defraud, (b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,	First Claim For Relief Fraud and deceit with respect to securities or securities business. ORS 59.135. It is unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security or the conduct of a securities business or for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise: (1) To employ any device, scheme or artifice to defraud; (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person;

The facts supporting the criminal guilty plea and those alleged here are also identical. The conduct which Whittier admitted to is the same conduct that defrauded Mr. Houston out of $2.75 million. The Indictment alleges that Whittier engaged in a scheme to defraud Wood River investors. Clerk's Exhibit 1 (Declaration of Robert S. Banks , Jr. In Support of Motion For Partial Summary Judgment, Exh B, p 3, ¶ 9.) The Indictment charges that Whittier falsely represented that Wood River pursued a broad investment strategy and that no investment would constitute more than ten percent of the holdings. In fact, the Indictment charged, Wood River's holdings of Endwave stock far exceeded ten percent. And, Whittier misrepresented to investors that the fund was being audited by outside auditors, when it was not. *Id.*

The complaint here describes the same fraudulent scheme, and makes the very same allegations. Paragraph 14 alleges that the offering memorandum misrepresented that Wood River would make diversified investments and that individual investments would be capped at ten percent of original costs. R. pp. 9-10. Paragraph 16 alleges that Wood River misrepresented that an auditor had been appointed for Wood River. R. pp. 10-11. Houston's Affidavit details the same facts: that he read the offering memorandum, and was led to believe that he was investing in a disciplined, diversified fund. Clerk's Exhibit 2, ¶¶ 3, 4, 7-9. Those are precisely the acts which Whittier pleaded guilty and admitted to in his criminal case.

3. Actually decided.

Whittier pleaded guilty to charges that his conduct in operating Wood River violated SEC Rule 10b-5, which, as shown above, is the same as Oregon's ORS 59.135. Moreover, Whittier specifically admitted in open court in his criminal case that (a) he was general partner of Wood River; (b) he engaged in wrongful conduct, including intentionally concealing the size of the fund's position in Endwave, which he admits was material to investors; (c) he intentionally misled investors in several ways, including intentionally failing to file SEC forms to disclose Wood River's over-concentrated position in Endwave. R. pp. 96-97; Clerk's Exhibit 1, Exhibit C, pp. 14-15.)

Whittier never denied Houston's allegations of misrepresentations and omissions in connection with the sale of Wood River because Whittier had already admitted them in connection

with his plea bargain with the United States. Whittier could not deny the misrepresentations because he had already acknowledged that they were true.

V. WHITTIER'S ARGUMENT THAT HOUSTON FAILED TO TENDER THE WOOD RIVER SECURITIES TO HIM IS CONTRADICTED BY THE RECORD AND MISSTATES THE TENDER REQUIREMENT.

Like other uniform securities act states, Oregon requires that the plaintiff tender his securities prior to entry of judgment against a defendant in a case brought under ORS 59.115 or ORS 59.135. ORS 59.115 provides:

> 2) The purchaser may recover:
>
> (a) Upon tender of the security, the consideration paid for the security, and interest from the date of payment

Houston tendered his Wood River securities to Whittier prior to the entry of judgment by letter from Houston's counsel to Whittier's counsel on March 3, 2008, stating :

> We are tendering to you Howard Houston's rights, title and interest in the Wood River Partners securities, which we will deliver upon receipt of payment by your client or others of the full amount of the principal and interest stated in the proposed judgment.

R. p. 140.

That is all the law requires. Whittier contends that Houston must actually *deliver* the securities to Whittier before Houston can have judgment, and that Whittier gets the securities without having to pay for them. As Houston explained in the district court, that is not the law. R. pp. 139-141, 155-159. If it were, Whittier would receive an unjust windfall even after committing

securities fraud. Whittier has not paid anything toward this judgment. There will be some repayment to Wood River investors from the Wood River Receiver and the United States Attorney's office. (The receiver has been liquidating all of Wood River's holdings and anticipates a distribution). Mr. Houston hopes to recover somewhere around $200,000 - $400,000 from those distributions. Those amounts will partially satisfy the Judgment against Whittier, and the Final Judgment so provides. The Final Judgment also requires Mr. Houston to file partial satisfactions of judgment whenever he receives any recovery from any other source. *See:* R. p. 157 (Final Judgment); pp. 140-141 (Banks Affidavit).

In telling fashion, Whittier wanted the district court, and now wants the Idaho Supreme Court, to require Houston to deliver the rights to the Wood River securities to Whittier. The only reason is that Whittier wants to receive for himself Houston's portion all of the restitution and recovery funds that were paid (see Order Granting Motion, Exhibit 6 - Partial Satisfaction of Judgment) and that Houston anticipates and hopes will be paid by the receiver.[1]

The cases that Whittier cites merely confirm that statutory requirement – that plaintiff must tender his shares to receive the consideration paid for them. Defendant's citation to a quote from

---

[1]Whittier also contends that he is entitled to Wood River securities when others pay Houston. Appellants Brief at 35-36, n. 12. Houston did as he was required to do when he recovered any funds from other sources – he reduced the amount of judgment owing by Whittier by filing a Partial Satisfaction of Judgment. Order Granting Motion, Exhibit 6. A partial recovery by Houston does not entitle Whittier, who has paid nothing, to receive a percentage of any other sources of recovery.

Metal Tech Corp. v. Metal Techniques Co., 74 Ore. App. 297, 703 P.2d 237 (1985), is incomplete and potentially misleading. The case does not hold that in order to tender, a prevailing party in an ORS 59.115 case must deliver the stock to the losing party, as Whittier suggests. The *Metal Tech* appeals court concerned a standing issue, i.e., whether plaintiff had standing to bring a shareholder derivative claims against individual defendants. The trial court granted summary judgment to defendant on that claim. Plaintiff had no standing to pursue the derivative claims since the court had already granted rescission to the defendant, thus divesting plaintiff of his stock in the company on whose behalf he sought to bring the derivative claims. The court of appeals reversed the standing decision. It noted that there was an unresolved counterclaim against plaintiff for violations of ORS 59.115 in connection with the transaction that had already been rescinded. If defendants prevailed on that claim, they would have to tender their shares back to plaintiff, and he would then acquire future standing to bring his derivative claims. The tender requirement of ORS 59.115(2)(a) were not at issue in the case; indeed, the court reversed a grant of summary judgment on the statutory claim, and remanded it for trial. And, it was clear there that plaintiff would re-acquire the stock in order to obtain standing to pursue his derivative claims. Neither *Metal Tech*, nor any other case in Oregon, holds that a plaintiff must deliver his securities without payment before he can obtain a judgment.

The rescissionary measure of damages in the blue sky laws allow a plaintiff to unwind the transaction. To put the parties in the positions they were in prior to the transaction, as rescission

requires, a plaintiff tenders the security back, and the defendant returns the money paid. The 2002 Uniform Securities Act itself makes that clear. It provides:

> SECTION 509. CIVIL LIABILITY
>
> (a)(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest [at the legal rate of interest] from the date of the purchase, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3).
>
> (2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security **and willingness to exchange the security for the amount specified**.

(Emphasis added.) A copy of the relevant pages of the 2002 Uniform Securities Act is a part of the record at R. p. 158-159.

The words "tender" and "deliver" are distinct throughout the law. Another example in Oregon is ORS 20.080, which provides for attorney fees in small cases unless defendant had previously tendered the damages. It provides as follows:

> (1) In any action for damages for an injury or wrong to the person or property, or both, of another where the amount pleaded is $ 5,500 or less, and the plaintiff prevails in the action, there shall be taxed and allowed to the plaintiff, at trial and on appeal, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant not less than 10 days before the commencement of the action . . . However, no attorney fees shall be allowed to the plaintiff if the court finds that the defendant **tendered** to the plaintiff, prior to the commencement of the action . . . an

amount not less than the damages awarded to the plaintiff.

As the courts have recognized in that context, "tender" refers to an "*offer* of settlement." *Fresk v. Kraemer*, 337 Ore. 513, 524-525 (Or. 2004)(emphasis added). The defendant need not deliver payment to the plaintiff in order to comply with the statute. And, the defendant can condition the tender upon the delivery of a release by the plaintiff. *Id.*

Whittier's argument makes no sense, and there is no Oregon case that supports such a nonsensical position. In his reading of ORS 59.115(2)(a), Houston clearly has an obligation to tender his securities upon payment for them, but he has no obligation to deliver them until he is paid. If it were otherwise, whenever there were multiple defendants in a securities case, any one of them could accept the tender, take the securities without paying for them, and claim the proceeds from any recovery from any of the other defendants.

VI. WHITTIER'S ARGUMENT THAT HOUSTON DID NOT MOVE FOR SUMMARY JUDGMENT ON THE ISSUE OF DAMAGES HAS NO SUPPORT IN THE RECORD BECAUSE HOUSTON SPECIFICALLY MOVED FOR SUMMARY JUDGMENT ON TWO CLAIMS FOR RELIEF AND INTRODUCED ALL THE REQUIRED EVIDENCE TO PROVE THE AMOUNT OF RESCISSIONARY DAMAGES.

Houston moved for summary judgment on his first claim for relief for violations of ORS 59.135 and on his second claim for relief for violations of ORS 59.115. R. pp. 85-87. In support of that motion, Houston submitted an affidavit in which he detailed the dates and amounts of his investment. Clerk's Exhibit 2, ¶ 6. (Affidavit of Howard Houston).

Houston's first and second claims for relief award statutory damages based upon a theory of rescission. ORS 59.115(2) provides:

> 2) The purchaser may recover:
>
> (a) Upon tender of the security, the consideration paid for the security, and interest from the date of payment equal to the greater of the rate of interest specified in ORS 82.010 for judgments for the payment of money or the rate provided in the security if the security is an interest-bearing obligation, less any amount received on the security

Houston's evidence allowed the district court to calculate the amount of damages to which Houston was entitled.

Despite those facts, Whittier appeals the decision, arguing that Houston never requested summary judgment on the issue of damages. Although he was given ample opportunity to do so, Whittier never challenged the dates or amounts of Houston's investments, because there was no basis to do so.

Whittier's argument is frivolous. As the district court correctly ruled:

> Houston moved for summary judgment based upon, among other things, the affidavit of Howard Houston filed on October 30, 2007. That affidavit clearly sets forth that amounts that Houston paid to Wood River Partners. The amount and timing of these payment was never controverted by defendant Whittier. . . [P]laintiff Houston never limited his motion solely to the issue of liability. Indeed, he moved for summary judgment on his first and second claims set forth in his complaint. Accordingly, a finding pursuant to Rule 56(d) as to the amount and timing of payments made by Houston, which formed the basis of the damages claim, was appropriate upon summary

CONCLUSION

For all the reasons set forth in this brief, the Respondent respectfully requests this Court to affirm the district court's judgment, and to award the respondent his attorney fees and costs on appeal.

Respectfully submitted on December 4, 2008

BANKS LAW OFFICE, P.C.

Robert S. Banks, Jr.

Ned Williamson

Ned Williamson
Attorney At Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of December 2008, I served a true and correct copy of RESPONDENT'S BRIEF upon the parties named below, via Federal Express - Next Day Delivery as follows:

Jeffrey A. Thompson
Elam & Burke, P.A.
251 E. Front St., Ste. 300
P.O. Box 1539
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DATED: December 5, 2008

_____
Robert S. Banks, Jr.

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